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COUNTER STATEMENT.

This suit was instituted by President Judge Vincent A. Carroll,[1] on behalf of the Court of Common Pleas of Philadelphia, on June 16, 1970, after the Philadelphia City Council had rejected the request of the Court of Common Pleas for additional funds necessary for Court administration.

The Pennsylvania Supreme Court appointed a judge of the Superior Court of Pennsylvania, an intermediate appellate court, to preside specially. The pleadings were promptly completed and the legal issues delineated. Trial started on August 14, 1970, during which the Court of Common Pleas introduced extensive testimony to prove the funds requested were reasonably necessary for the continued operation of the Court.

Prior to starting suit, the Court of Common Pleas presented its financial needs to the City Finance Director, the Mayor and members of City Council, at the various hearings on budget requests held by these municipal agencies pursuant to the Philadelphia City Charter. It was only after the identical amounts requested in the present suit were rejected by the City Council, after a factually documented presentation by Respondent, that the present suit was started, as a last resort.

Although the Court of Common Pleas initially requested $5,230,117.00 in its Complaint, this figure was amended and reduced to $3,962,532.00 after the completion of testimony. The lower trial Court awarded the Court of Common Pleas $2,458,000.00 and the Supreme Court of Pennsylvania, in affirming the judgment of the trial court, reduced the amount of the judgment to $1,365,555.00, solely

1. On Nov. 16, 1970, President Judge Carroll retired from his office as Judge of Court of Common Pleas of Philadelphia (he died Dec. 4, 1970); on Dec. 2, 1970, Hon. D. Donald Jamieson, the present Respondent, became President Judge of the Court.

because of the delay that had taken place during the fiscal year (July 1, 1970-June 30, 1971), as the judgment is only effective during the present fiscal year, and the judgment will become moot as of June 30, 1971.

The reasons that compelled the filing of the instant suit were explained by Judge Carroll in his testimony at the budget hearings before City Council on May 4, 1970 when he stated:

> "The problems of administering a court system in a large metropolitan city without sufficient judges, court personnel, an archaic court system and a court system with many divided jurisdictions are multitudinous, and yet, despite all these limitations the administration of the Courts of Philadelphia is doing an extraordinary competent job considering the problems confronting us. The budget which we submitted to the Finance Department and which was rejected almost totally by the Mayor is vitally necessary to the efficient operation of the Philadelphia Courts."
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> • • •
>
> "The Judiciary can no longer permit its rate of progress and efficiency to be measured by a non-responsive and antagonistic executive who completely misunderstands the role and function of a separate and distinct branch of government."

Respondent's mandamus action sought additional funds for the following purposes:

¶ additional personnel as probation officers.

¶ release-on-recognizance bail project.

¶ miscellaneous personnel requirements, such as law clerks for Judges and apprehension of "bail jumpers."

¶ equipment necessary for functioning of the Court, (e.g., data processing, copying).

Following the completion of testimony the lower court issued a writ of mandamus in the amount of $2,458,000, for various personnel and equipment requirements, and both parties filed exceptions—Petitioners alleging that no award should have been made, and respondents alleging that the trial court erred in reducing or disallowing certain items which Respondent had proven reasonably necessary for court administration. The exceptions were dismissed by the trial court, and an appeal was immediately taken by both petitioners and respondent to the Pennsylvania Supreme Court. The within petition was filed following the opinion of the Pennsylvania Court, and denial of rehearing by that Court.

Petitioners moved for a stay of the mandate from the Pennsylvania Supreme Court, which was denied March 24, 1971; and a similar motion to this Court was denied by Associate Justice William J. Brennan, sitting as Circuit Justice, on April 2, 1971.

REASONS WHY WRIT SHOULD NOT BE GRANTED.

Petitioners have challenged the inherent power of the judiciary to compel the Mayor and City Council of Philadelphia to appropriate for the Court of Common Pleas of Philadelphia, those sums that are reasonably necessary for that Court to carry out is constitutionally and legislatively mandated duties.

In asserting for the first time in this Petition any federal constitutional question, they have alleged three reasons in support of their Petition for Certiorari:

(1) Compliance with the final judgment violates the principle of one man one vote as guaranteed under the XIV amendment of the United States Constitution and as construed by this Court in *Baker v. Carr,* 369 U. S. 186 (1962), and related cases (See Petitioners Questions Presented, No. 1).

(2) Giving the judicial branch the power to compel funds for its reasonable needs is a form of taxation without representation and violates Article IV, Section 4 of the United States Constitution in that it denies to the people of Pennsylvania the right to a Republican Form of Government (See Petitioners' Questions Presented, No. 1).

(3) There is no evidence in this case that the denial of funds by local government has destroyed or impaired the judicial function—and therefore granting the relief sought by the Common Pleas Court of Philadelphia in this case constitutes an unlawful interference with the Separation of Powers principle (See Petitioners' Questions Presented No. 2).

This Court should disallow petitioners request for all or any one of the following reasons:

(1) Petitioners have no *right* to raise these alleged federal constitutional issues because, in violation of this Court's rule in *Cardinale v. Louisiana,* 394 U. S. 437 (1969), they failed to raise them in any of the State Court proceedings at any level.

(2) The one man one vote principle of *Baker v. Carr, supra,* and related cases arises only under the equal protection clause of the XIV amendment and applies only where there has been demonstrated discrimination among the same classes or categories of voters. No such question is raised by the instant case.

(3) The right to a Republican Form of Government is concerned with the peoples' right to elect their own representatives who *make* the laws. No such limitation applies under the United States Constitution to the right of the people in each of the several states to delegate the power to *interpret and apply* the laws to an independent judicial branch.

(4) The right to a Republican Form of Government under Article IV, Section 4 of the United States Constitution is a political issue for the Congress and not a justiciable issue for the Courts. See *Luther v. Borden,* 77 How. 1 (1849) and *Highland Farms v. Agnew,* 300 U. S. 608 (1936).

(5) Petitioners have no standing to raise the alleged constitutional issues discussed in paragraphs two and three above in that only a citizen of a state, (and not the state itself), can raise issues of alleged discrimination in the question of voting rights and proportional representation.

(6) The scope and division of power among the Judicial, Executive, and Legislative branches of state government is solely a question of state law—and does not invoke any question of federal or constitutional law. See *Highland Farms v. Agnew*, 300 U. S. 608, (1936).

(7) The record in the instant case established overwhelmingly—and in fact is uncontradicted—that the funds sought and allowed were urgently needed, were reasonably necessary, and that their denial would impair the Court in performing its constitutionally and legislatively mandated functions of judicial administration.

1. Failure to Raise Federal Constitutional Issues in the State Court.

The arguments that the right to a republican form of government under Article IV, § 4 of the United States Constitution is being violated, as well as the issue of "one-man, one-vote," were not raised in the Pennsylvania trial Court, or in the Pennsylvania Supreme Court, and therefore should not be considered by this Honorable Court.

In *Cardinale v. Louisiana*, 394 U. S. 437 (1969), this Court held it would not review alleged federal constitutional violations not raised in the state Court:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell*, 10 Pet. 368, 9 L. Ed. 458 (1836), Justice Story review the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344, 3 L. Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this

Court with no jurisdiction unless a federal question was raised and decided in the state Court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell v. Nicholls,* 4 Wheat, 311, 315, 4 L. Ed. 578 (1819), and since, *e.g., Safeway Stores Inc. v. Oklahoma Retail Grocers, Ass'n, Inc.,* 360 U. S. 334, 342, n. 7, 79 S. Ct. 1196, 1201, 3 L. Ed. 2d 1280 (1959), [citing other cases]. 394 U. S. at 438.

2. The Judgment of the Pennsylvania Supreme Court Does Not Violate the One-Man, One-Vote Principle.

Baker v. Carr, 369 U. S. 186 (1962), was decided under the 14th Amendment's equal protection clause, and determined the extent to which the federal courts may enforce the equal protection clause to limit a state legislature in designing unequal geographical districts from which representatives are chosen. As interpreted in *Baker* and later cases, the concept of "one-man one vote" means that some voters must not be placed in a position of inequality vis-a-vis other voters; i.e., one person's vote must be counted equally with that of another person. *Reynolds v. Sims,* 377 U. S. 533, 560 (1964).

This case, dealing with the rights of the judiciary vis-a-vis the legislative and executive branches of government, does not in any way offend the one-man one-vote principle. The Judges of the Court of Common Pleas of Philadelphia are elected in a city-wide election, by all voters of the City. Further, Petitioners do not allege any discrimination among classes of voters.

Petitioners in raising the issue of "one-man one-vote," fail to show any discrimination which is recognizable under the equal protection clause. To the extent petitioners are trying to assert a general right of a citizen to have state government administered according to certain laws, such a right, if it exists, is not enforceable by federal courts. *Fairchild v. Hughes*, 258 U. S. 126 (1922).

Although the direct holdings of *Baker* and *Reynolds* have no application to this case, the policy underlying these decisions supports the opinion of the Pennsylvania Supreme Court in this case. For the "reapportionment cases" demonstrate that if the legislative branch fails to carry out its mandated duties—in the present context, to provide adequate funding for the courts—then the judicial branch will act to maintain a proper balance of power—and enforce the constitutional balance. Just as *Baker* holds that malapportionment presents a justiciable controversy, so the present case stands for the proposal that legislative sapping of financial support for the judiciary presents a substantial threat to judicial independence, remedial by a mandamus action by the judicial branch against the legislative and executive branches.

3. The Guaranty of a Republican Form of Government Under the United States Constitution Does Not Affect the Power of a State Judiciary to Interpret and Apply the Law.

Petitioners contend that the recognition of inherent power in the Judiciary to compel funds for judicial administration is equivalent to the power to tax—and therefore denies to the people their right to a republican form of government. This is preposterous.

In the first place, the judiciary's inherent power is limited to things judicial—and as pointed out in Section 6

below, is an integral part of the genius of our unique separation of powers principle. Without this inherent power, the judiciary, being the weakest of its sister branches, would be at the mercy and subject to the political control and domination by the executive and legislative branches. This would be the rankest form of the denial of due process and make a mockery of our judicial system.

Secondly, it seems clear beyond peradventure that the guaranty of Article IV, Section 4 applies only to the law making function of government.

Nothing in the United States Constitution limits the power of the people of the various states to delegate to an independent judicial branch[2] the responsibility to *interpret and apply* the laws. As this Court held in the landmark case of *Marbury v. Madison*, 1 Cranch 137, 177-8 (1803):

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.
>
> So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the Court must either decide that case conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

2. Under the Pennsylvania Constitution, all judges are elected by the people. Thus it could be argued that this fulfills the requirement of a republican form of government even as respects the judiciary. But this would be a slender reed indeed, on which to lean in disposing of this issue—for if Petitioners' legal argument were to be accepted, it would mean that no state, or for that matter, not even the Congress could permit life time appointments to the judiciary—which is a time honored principle that has recently received renewed endorsement by the President's Williamsburg Conference on the Judiciary. See Article in New York Times, March 12, 1971, p. 18.

4. The Right to a Republican Form of Government, Under Article IV, § 4 of the United States Constitution, Is Non-Justiciable.

It has long been held that, on the federal level, only Congress, and not federal Courts, has the power to enforce Art. IV, § 4. It was established in the pioneer case of *Luther v. Borden*, 7 How 1 (1849), that questions arising under this section are political, not judicial in character and that "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character." And as Mr. Justice Cardozo said, in *Highland Farms v. Agnew*, 300 U. S. 608 (1936); upholding a state's delegation of legislative-type power to an administrative agency:

> How power shall be distributed by a state among its governmental organs is commonly, if not always a question for the state itself. Nothing in the distribution here attempted supplies the basis for exception. The statute is not a denial of a republican form of government. Constitution, Art. IV, Section 4. Even if it were, the enforcement of that guarantee according to settled doctrine, is for Congress, not the Courts . . .
>
> . . . A judgment by the highest court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere. 300 U. S. at 612-13.

And *Baker v. Carr*, 369 U. S. 186 (1962), in holding that cases of unequal representation were justiciable in federal courts, expressly reached this conclusion under the 14th Amendment's equal protection clause, and reaffirmed *Luther v. Borden* in refusing to resort to the "Guaranty Clause" of Art. IV, § 4.

5. Petitioners Do Not Have Standing.

Petitioners are acting exclusively in their official capacity, and thereby do not have standing to raise issues such as one-man one-vote, and denial of a republican form of government. *Baker v. Carr, supra,* held that standing existed only if there was:

> such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional question. 369 U. S. at 204.

In *Baker,* as in most other apportionment cases following in its wake, the plaintiffs have been individual voters, aggrieved because of the diminution of their vote in comparison with other equally situated voters. Petitioners herein can show no such personal interest.

6. Division of Power Among Branches of State Government Does Not Present a Federal Question.

Petitioners' argument concerning the "doctrine of separation of powers" is purely a matter of state constitutional interpretation and fails to raise a question under the constitution of the United States, which does not impose such a doctrine on the various states of the United States. Nonetheless, Pennsylvania does in fact adhere to the doctrine.[3]

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3. Pennsylvania decisions have long upheld the principle of separation of powers as a matter of state constitutional doctrine, *Case of Borough of West Philadelphia,* 5 W&S 281 (1843); *Commonwealth v. Mann,* 5 W&S 403 (1843); *De Chastelleux v. Fairchild,* 15 Pa. 18 (1850); *Commonwealth ex rel. Attorney General v. Mathues,* 210 Pa. 372 (1904); *Bailey v. Waters,* 308 Pa. 309 (1932); *Wilson v. Philadelphia School District,* 382 Pa. 225 (1937); *Leahey v. Farrell,* 362 Pa. 52 (1949); *Lennox v. Clark,* 372 Pa. 355 (1953); *Commonwealth v. Knox,* 172 Pa. Super. 510 (1953) and *Stander v. Kelley,* 433 Pa. 406 (1969), and the opinion of the Supreme Court of Pennsylvania in this case confirms and strengthens this principle.

The present suit was brought under the established principle that the judiciary, as a separate and equal branch of government, possesses all powers coequal with its duties and possesses the inherent power to determine and compel payment of those sums that are reasonable and necessary to carry out its mandated responsibilities for judicial administration. If it were otherwise, the judicial system would be at the mercy of the legislative or executive branch of government, subservient thereto, and not an equal and coordinate power.

The principle of inherent power of courts is settled doctrine in Pennsylvania and other states; counsel for Respondent represents that extensive legal research has conclusively shown that every state court that has considered this principle, has approved it.

Providing additional funds for court purposes by application of the inherent power principle has been recently upheld by the highest courts of, *e.g.*, Indiana, *Carlson v. State ex rel. Stodolan,* 247 Ind. 172, 22 N. E. 2d 532 (1966); Michigan, *Judges for Third Circuit v. County of Wayne,* 172 N. W. 2d 436 (1969); and Colorado, *Smith v. Miller,* 153 Colo. 35, 384 P. 2d 738 (1963).

That separation of powers, or the mode of separation, is not enforceable on states by federal courts, is seen from the quotation, *supra,* in Justice Cardozo's opinion in *Highland Farms v. Agnew,* 300 U. S. 608, 612-3 (1908) (see page 10 above).

Furthermore, the opinion of Pennsylvania Supreme Court in this case is completely supported by the Pennsylvania Court's interpretation of the Pennsylvania Constitution, and thereby rests on an adequate and independent state ground. In *Herb v. Pitcairn,* 324 U. S. 117 (1945), this court remanded a case under the Federal Employees' Liability Act to a state court to determine whether the case

rested on an independent state ground. As Mr. Justice Jackson said, 324 U. S. at 125-6:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [citing cases] The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

7. The Record in the Case Showed the Urgent Need for Funds Mandated.

The Court of Common Pleas presented extensive testimony, by Judges of the Court, the Court Administrator and his staff, and by various members of the bar; as well as numerous Exhibits; to prove the urgent necessity of the funds sought. The opinion of the Pennsylvania Supreme Court endorsed the "reasonably necessary" test and found that the factual record before the trial Judge warranted additional funds:

> The Court does not have unlimited power to obtain from the City whatever sums it would like or believes it needs for its proper functioning or adequate administration. Its wants and needs must be proved by it to be

> "reasonably necessary" for its proper functioning and administration, and this is always subject to Court review.
>
> * * *
>
> We agree with Judge Montgomery's conclusion that "the amount recommended by Mayor Tate and approved by Council is inadequate to meet the reasonable needs of the Court [of Common Pleas] for the present fiscal year."

Because the Judgment of the Pennsylvania Supreme Court includes findings of fact, supported evidentially by the trial court record, showing the urgent need for additional funds by the Court of Common Pleas, this Court should not grant certiorari to review a state court's factual determinations. See *Portland Railroad Co. v. Oregon Railroad Commission*, 229 U. S. 397 (1913).

CONCLUSION.

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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